

**PHILIP ROUSSEAU**

Appellant

vs.

**HOWARD COUNTY PLANNING BOARD,  
WEGMANS FOOD MARKETS, INC., &  
SCIENCE FICTION, LLC**

Appellees

: BEFORE THE  
:  
: HOWARD COUNTY  
:  
: BOARD OF APPEALS  
:  
: HEARING EXAMINER  
:  
: BA Case No. 632-D

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**DECISION AND ORDER**

On June 2, 2008, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the administrative appeal of Philip Rousseau (the "Appellant"). The Appellant is appealing the January 31, 2008, December 19, 2007 letter from the Howard County Planning Board to Wegmans and Science Fiction ("Appellees") informing them that it approved SDP-07-131 that same date. The appeal is filed pursuant to Howard County Code ("HCC") Section 16.900(j)(2)(iii).

I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Appellants certified that notice of the hearing was advertised and that adjoining property owners were notified as required by the Howard County Code.

Susan Gray, Esquire, represented the Appellant. Richard Talkin and Sang Oh, Esquires, represented Appellees Wegmans Food Markets, Inc. and Science Fiction, LLC.

At the outset of the hearing, Appellees moved for dismissal of the case for the Appellant's failure to timely file the appeal. Upon consideration of Appellees' motion and the testimony and

oral arguments presented, and for the reasons stated below, I have determined to grant the motion and dismiss the appeal.<sup>1</sup>

### **Background**

In 2007 the Howard Research and Development Corporation (General Growth Properties) ("GGP") petitioned the Howard County Planning Board (the "Board") to amend a final development plan ("FDP"), FDP-117-A-II by adding the phrase "full service food and grocery stores, and related uses, of 100,000 square feet or more" as a "permitted use" under Criteria 7D, "Employment Center-Industrial Land Use Areas." This Final Development Plan encompasses a 181±-acre parcel of "New Town" zoned land known as the Sieling Industrial Center, Section 1, Area 1. The subject property lies on the west side of Snowden River Parkway between MD 175 and Oakland Mills Road. After public hearing, the Board by letter dated September 6, 2007 informed GGP of its approval of the requested FDP amendment (the "Amended FDP"), stating it clarifies that large full service food and grocery stores, and related uses are a permitted use under Criteria 7D, "Employment Center-Industrial Land Use Areas."

Appellee Science Fiction, LLC is the owner of Parcel "D-2" in the Sieling Industrial Center, Section 1, Area 1, where a large full service and grocery store is permitted under the Amended FDP. Appellee Wegmans is a large full service food and grocery store proposing to construct a store on Science Fiction's property.

Appellant is a resident of Howard County who is opposed to the Amended FDP. On March 3, 2008, Appellant filed an administrative appeal petition seeking review of a January 31, 2008 letter from Marsha McLaughlin, Executive Secretary to the Howard County Planning

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<sup>1</sup> Hearing Examiner Rule 3.3 requires me to dismiss a petition if I lack jurisdiction to hear it.

Board to the Appellees, informing them of the Planning Board's decision to approve their site development plan ("SDP") on even date. The alleged errors of law and fact are: (1) the SDP's approval is predicated on an illegal amendment to the SDP; (2) the Board impermissibly refused to consider the illegality of the FDP amendment, and; (3) the SDP traffic study is flawed. Appellant claims to be aggrieved because his right to referendum is circumvented and the project traffic will diminish the use and enjoyment of his property and compromise his personal safety.

**Appellees' Motion to Dismiss**

HCC Section 16.900(j)(2)(iii) governs the time period for appealing a Planning Board decision. This section states in pertinent part:

"Any person specially aggrieved by any decision of the Planning Board and a party to the proceedings before it may, within thirty (30) days thereof, appeal said decision to the board of appeals in accordance with section 501 of the Howard County Charter."

The operative decision in this case is the Planning Board's letter of January 31, 2008, informing Appellees that it had approved SDP-07-131.<sup>2</sup> This letter also notices Appellees of the 30-day time period for filing an appeal and states: "Such appeal shall be filed not later than thirty days from the date of action of the Planning Board [on or before March 1, 2008.]" In 2008, March 1 fell on a Saturday. Appellant filed the appeal in this case on Monday, March 3, 2008.

Appellees argue in their memorandum in support of their motion to dismiss that the time to appeal the language of HCC Section 16.900(j)(2)(iii) is the exclusive means for delimiting the rights of an appeal, including to allotted time to file an appeal. In his response to the motion,

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<sup>2</sup> The Board did not approve a requested height adjustment to the grocery store tower because the request to adjust the store's maximum height was improperly posted.

Appellant contends the appeal was timely based on the computation of time directive set forth in Maryland Rule 1-203 which states in relevant part:

(a) In computing any period of time prescribed by these rules, by rule or order of court, or by an applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. If the period of time allowed is more than seven days, intermediate Saturdays, Sundays and holidays are counted; but if the period of time allowed is seven days or less, intermediate Saturdays, Sundays, and holidays are not counted. The last day of the period so computed is included unless:

(1) it is a Saturday, Sunday, or holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or holiday; or

(2) the act to be done is the filing of a paper in court and the office of the clerk of that court on the last day of the period is not open, or is closed for a part of a day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, holiday, or a day on which the office is not open during its regular hours.

Relying on these time guidelines, Appellant avers the time to appeal ended on a Monday because the last day to appeal fell on a Saturday, when County offices are closed.

### Discussion

As a starting point, it is well established that the right to appeal is statutory. *Howard County v. JJM*, 301 Md. 256, 482 A.2d 908 (1984) (citing *Maryland Bd. v. Armacost*, 286 Md. 353, 354-55 (1979); *Criminal Inj. Comp. Bd. v. Gould*, 273 Md. 486, 500 (1975); *Urbana Civic v. Urbana Mobile*, 260 Md. 458, 461 (1971)). Where such statute provides a specific remedy and procedure for administrative appeal, they must be followed scrupulously. *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 422 A.2d 55 (1980) (internal citations omitted). Where a statute mandates the time to appeal runs from a fixed date, and requires a notice of appeal to be filed with certain days of the decision, the Maryland Court of Appeals has

consistently held that the appellate tribunal has no authority to decide a case on its merits when the appeal is not filed within the prescribed time frame after the final decision. *United Parcel Service v. People's Counsel for Baltimore County*, 336 Md. 569, 650 A.2d 226 (1994) (holding the Board of Appeals erred, as a matter of law, that it could exercise jurisdiction under the "discovery rule" to hear an administrative appeal of a building permit issued on October 28, 1986, considering the operative event to be a July 19, 1987 letter from the Zoning Commissioner explaining that the building permit for a warehouse use was properly issued and concluding protestants' appeal was untimely where the determinative date for taking an appeal was 30 days from the County's October 28, 1986 issuance of the permit).

In the instant appeal, Appellant's remedy was to file an administrative appeal petition within the 30-day time period prescribed by HCC Section 16.900(j)(2)(iii). This is an absolute prerequisite to pursuing an administrative appeal and pursuant to Hearing Examiner Rule 3.3, the hearing examiner must dismiss an appeal that is not timely filed for lack of jurisdiction. Additionally, the letter of decision being appealed in this case clearly stated that any appeal must be filed on or before March 1, 2008. Appellant, however, chose not to file the petition on or before March 1, a Saturday, waiting instead until Monday, March 3 to do so.<sup>3</sup>

Appellant wrongly avers Maryland Rule 1-203(c) should guide the statutory time to file an administrative appeal. A case directly on point is *Fallston Meadows Community Ass'n v. Board of Child Care of Baltimore Annual Conference of United Methodist Church*, 122 Md. App. 683, 716 A.2d 344 (1998). The Fallston Meadows protestants appealed a March 1, 1996 Harford County Department of Planning and Zoning decision to approve a preliminary

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<sup>3</sup> February 2008 had 29 days, 2008 being a leap year.

subdivision/site plan to the Board of Appeals on March 25, 1996. The Board of Appeals Hearing Examiner dismissed the appeal for lack of subject-matter jurisdiction, concluding the protestants should have taken the appeal to circuit court. In two separate appeals, the protestants appealed the department's site plan approval and the Board's subsequent ratification of the hearing examiner decision to circuit court. In a consolidated hearing, the circuit court affirmed the Board decision and dismissed the initial appeal as untimely.

After affirming the lower court decision, the Maryland Court of Special Appeals opined that even if the Board had jurisdiction, the Court would nonetheless have dismissed the appeal, because the initial appeal to the Board of Appeals hearing examiner was not timely filed. The relevant statute required an appeal of a decision of the Zoning Administrator to the Harford County Board of Appeals to be taken within 20 days. The determinative date being March 4, 1996, when a copy of the plan was marked as received and mailed to the protestants, the 20<sup>th</sup> day following the March 4 action was Sunday, March 24. Protestants, however, waited until Monday, March 25 to file, one day beyond the allotted 20-day filing period for appealing the decision mailed on March 4.

The *Fallston Meadows* Court rejected the protestants' argument that Maryland Rule 1-203(c) guided the computation of the statutory 20-day appeal period, entitling them to file their appeal on Monday, March 25. As the Court explained, Md. Rule 1-101 establishes that the time rule applies only to *matters of court in the state*, excepting certain courts (emphasis added). Consequently, the Harford County Board of Appeals was not subject to the dictates of the Maryland Rules, because the board is neither a court of competent jurisdiction nor judicial tribunal within the meaning of the Rules themselves. *Fallston Meadows*, 122 Md. App. at 697-

698, 716 A.2d at 351-352. Rather, the time prescribed for filing appeals is governed by local regulations.

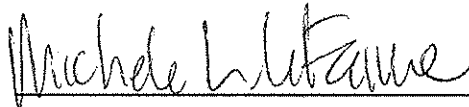
In this case, the governing local regulation is HCC Section 16.900(j)(2)(iii). The determinative date for purposes of this appeal is January 31, 2008, the date of the letter informing Appellees of the Planning Board decision to approve their SDP on even date. The thirty-day period to appeal ended on March 1, 2008. Because Appellant did not file his appeal until March 3, 2008, the appeal petition was filed beyond the allotted time and must be dismissed as untimely.

**ORDER**

Based upon the foregoing, it is this 23<sup>rd</sup> day of June 2008, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Appeal of Philip Rousseau in BA Case No. 632-D is hereby  
**DISMISSED.**

**HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER**



Michele L. LeFaivre

Date Mailed: \_\_\_\_\_

6/24/08

**Notice:** A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.